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7 **UNITED STATES BANKRUPTCY COURT**
8 **DISTRICT OF ARIZONA**

9 In re:

10 BCE WEST, L.P., *et al.*,

11 Debtors.

12 EID # 38-3196719
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19 In Re:

20 BOSTON CHICKEN, INC.
21

22 In Re:

23 MAYFAIR PARTNERS L.P.
24

25 In Re:

26 BC REAL ESTATE INVESTMENTS, INC.

Chapter 11

Case Nos. 12547
Through 12570 ECF CGC

Jointly Administered

**MOTION FOR ORDER REQUIRING
DEBTOR TO COMPLY WITH TERMS
OF AMENDED ORDER ON FOURTH
MOTION FOR AUTHORITY TO SELL
REAL PROPERTY OUTSIDE ORDINARY
COURSE OF BUSINESS FREE AND
CLEAR OF LIENS (DE #619) ENTERED
APRIL 27, 1999 AND PURCHASE AND
SALE AGREEMENT BETWEEN BC REAL
ESTATE INVESTMENTS, INC. AND
COLUMBIA COMMUNITY CREDIT UNION
("COLUMBIA").**

98-12548-ECF-CGC

98-12549-ECF-CGC

98-12564-ECF-CGC

DATE: August 24, 1999
TIME: 10:00 A.M.

27 **I. INTRODUCTION.**

28 Movant RTM Portland, Inc., ("RTM") is the back-up bidder in the Debtor's sale of certain real

1 property known as Store #588, The Orchards, Vancouver, Washington. On March 30, 1999, the Court,
2 pursuant to the Debtor's Fourth Motion for Authority to Sell Real Property Outside of the Ordinary
3 Course of Business, conducted bidding for the sale of the real property and the fixtures comprising Store
4 #588. At that hearing, Columbia Community Credit Union was the successful bidder at \$1,115,000;
5 RTM was the backup bidder for \$1,095,000. As directed by the Debtor, on or about April 15, 1999,
6 RTM executed and submitted Debtor's form purchase contract, entitled "Purchase and Sale Agreement
7 between BC Real Estate Investments, Inc. and RTM Portland, Inc." (the "RTM Purchase Contract") and
8 a First Amendment to Purchase and Sale Agreement and deposited with Debtor's escrow agent, the sum
9 of \$54,750.

10 On April 27, 1999, the Court approved the March 30, 1999 bid in its Amended Order on Fourth
11 Motion for Authority to Sell Real Property Outside Ordinary Course of Business Free and Clear of Liens
12 (DE #619) (the "Order"). A true and accurate copy of the Order is attached hereto as Exhibit A. On
13 information and belief, within the same time periods as RTM, Debtor caused the successful bidder,
14 Columbia to execute a purchase contract identical to the terms contained in the RTM Purchase Contract,
15 with the exception of the price term and the parties (the "Columbia Purchase Contract").¹

16 The Columbia Purchase Contract provided certain time periods with which Columbia was
17 required to comply and Columbia has failed to do so. Columbia's failure to timely close the transaction
18 contemplated by the Columbia Purchase Contract mandates that the Debtor look to the backup bidder,
19 RTM to consummate its sale. The Debtor has determined to overlook the requirements set forth in the
20 Columbia Purchase Contract and thereby has exceeded its authority in the Court's Order.

21 **II. THE COURT'S ORDER REQUIRES DEBTOR'S COMPLIANCE WITH THE TERMS**
22 **OF THE COLUMBIA PURCHASE CONTRACT.**

23 The Order, which grants the Debtor authority to sell the Property requires such sale to Columbia
24 "as the successful bidder for a total cash price of \$1,115,000, on the terms and conditions set forth in

25
26 ¹ Movant does not possess a copy of the purchase contract entered into between Columbia and
27 the Debtor. Upon information and belief, and based on the Court's Order authorizing the use of
28 Debtor's standard form contract, RTM believes its Purchase Contract to contain the same language as
that of the Columbia Purchase Contract, with the exception of the price term and the parties.

1 the Motion and in the Debtors' standard form contract." It goes further to state that "in the event
2 Columbia Community Credit Union fails to close the transaction, RTM Restaurant is approved as the
3 backup bidder for \$1,095,000 on the same terms and conditions, except that the earnest money is
4 irrevocably committed upon Columbia Community Credit Union's failure to close."

5 The form purchase contract provides for various conditions precedent to be fulfilled before a
6 buyer is required to close. Such conditions are set forth in Sections 5, 6 and 7 to the purchase contract.
7 The RTM Purchase Contract is attached hereto as Exhibit B. Section 5 of the purchase contract requires
8 buyer to object to any title defects contained in the title commitment ordered by the parties. Such title
9 objections are required within ten days from the Effective Date of the purchase contract, which date is
10 defined as the "date the last Party . . . executes th[e Purchase] Agreement." Thereafter, the Seller has
11 the right to either elect to cure or remove any of Buyer's title objections, or determine not to do so. If
12 the Seller does not remove Buyer's title objections, the Buyer can go forward with the transaction or
13 terminate the Purchase Contract. Purchase Contract, § 5.1 (b).

14 Section 6 of the form purchase agreement provides the Buyer an Inspection Period, in which
15 "Buyer shall approve or waive the Conditions set forth in Sections 5.1 (a) and 5.1(b) in writing . . . no
16 later than the thirtieth (30th) day after the Effective Date ('Inspection Period')." Similarly, Section 7
17 of the Purchase Agreement grants Buyer sixty days to obtain all rezoning, variances, building permits,
18 special use permits, and other government permits. In either instance, if Buyer has not approved or
19 waived the foregoing requirements within the requisite period of time, "either party may terminate this
20 Agreement within three (3) days after the expiration of the [applicable period] by delivering notice of
21 termination to the other Party . . .".

22 Debtor's counsel have averred that the Columbia Purchase Agreement has not been terminated
23 and that no such notices have been sent. The Purchase Contract is clear that in such event, if "**neither**
24 **Party has terminated the Agreement as provided herein, then the Conditions set forth in Section**
25 **5.1 . . . shall be deemed to be waived by Buyer, and the Parties shall proceed to Closing.**" [Emphasis
26 added.] Pursuant to Section 12 of the form purchase agreement, closing is to occur within 7 days after
27 all of the conditions have been satisfied.

1 Presuming that the Columbia Purchase Contract was entered into no later than April 15, 1999,
2 such closing should have already occurred. As a result of Columbia's failure to timely close, RTM,
3 should have been notified by the Debtor pursuant to Section 6 of the First Amendment to Purchase and
4 Sale Agreement, a copy of which is attached hereto as Exhibit C. Section 6 provides that upon
5 Columbia's failure "to consummate the transaction contemplated by the Successful Contract, Seller shall
6 give Buyer [RTM] notice that the Successful Contract has been terminated . . . and Seller and Buyer
7 [RTM] shall thereafter proceed to Closing. . .". The Debtor has failed to either consummate the
8 transaction or terminate the Columbia Purchase Contract, in accordance with its terms. As the
9 successful backup bidder, RTM should have by now been given the opportunity to proceed with the
10 purchase of Store #588 for its bid of \$1,095,000.

11 **III. DEBTOR'S BASIS FOR EXTENDING THE COLUMBIA PURCHASE CONTRACT IS**
12 **WITHOUT MERIT.**

13 Without any advance notice to RTM, the Debtor has extended the Contingency and Inspection
14 Periods under the Columbia Purchase Agreement. The sole reason provided by Debtor for such action
15 is because of the discovery of the existence of a restrictive covenant, restricting the use of the property.
16 The covenant is the subject of an adversary proceeding filed in this bankruptcy by Riverview
17 Community Bank (adversary proceeding no. 99-00496-CGC), whereby Riverview alleges the existence
18 of a restriction on the use of the parcel as a bank, savings and loan, credit union or other depository
19 institution. Columbia had a thirty day Inspection Period in which to investigate such conditions and to
20 object. Columbia had a additional thirty days during the Permit Period, in which to object on the basis
21 of its inability to secure appropriate permits. It failed to avail itself of such periods. Section 24 of the
22 Purchase Contract provides that time is of the essence with respect to the performance of the purchase
23 contract. In accordance with the terms of the form purchase contract, the Debtor has no ability to extend
24 such time periods, but is left with the remedy of proceeding to its backup bidder. By its failure to timely
25 do so, the Debtor has exceeded the scope of its authority as set forth in the Court's Order. By
26 unilaterally extending such time periods to Columbia, Debtor has prejudiced RTM's rights as the backup
27 bidder. For example, it has delayed the use or return of RTM's \$54,000 earnest money deposit. It has

1 also impacted on the anticipated timing of the closing of RTM's purchase.

2 **IV. RTM IS READY, WILLING AND ABLE TO PERFORM IN ACCORDANCE WITH**
3 **THE TERMS OF THE RTM PURCHASE CONTRACT.**

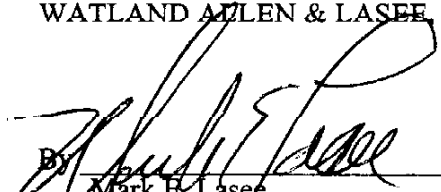
4 In April 1999, RTM tendered its earnest money deposit and the RTM Purchase Contract to the
5 Debtor. It is ready, willing and able to perform under the terms and conditions of its back up bid,
6 unencumbered by the restrictive covenant that has proved to be the downfall of Columbia's position.
7 RTM needs only the direction of the Debtor to go forward and can close the transaction in a shorter time
8 period than it will take for Riverview's adversary complaint to be heard.

9 **V. CONCLUSION.**

10 RTM respectfully requests an order from this Court requiring the Debtor to comply with the
11 terms of the Court's original order, thereby declaring a default of Columbia on the Columbia Purchase
12 Contract and instructing RTM to proceed under the First Amendment to Purchase and Sale Contract to
13 close the transaction in accordance with its terms.

14 DATED this 3rd day of August, 1999.

15 WATLAND AZLEN & LASEE, PLLC

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17 
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